

Appln. No.: 09/610,005
Reply Brief dated September 3, 2004



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GROUP 3600

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re the Application of:

Jay DONAHUE

Serial No.: 09/610,005

Filed: July 5, 2000

For: Method and Apparatus For Negotiating
A Real Estate Lease Using A Computer
Network

Atty. Docket No.: 011684.00003

Group Art Unit: 3621

Examiner: Greene, Daniel L.

Confirmation No.: 4305

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REPLY BRIEF

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Sir:

This is a Reply Brief in accordance with 37 C.F.R. § 1.193 (b), filed in triplicate, in response to the Examiner's Answer dated July 7, 2004.

Please charge any necessary fees in connection with this Reply Brief to our Deposit Account No. 19-0733.

Appellant notes that a Request For Oral Hearing was previously requested in a separate filing on April 12, 2004.

Appellant's arguments in reply to the Examiner's Answer begin on the following page.

ARGUMENT

The Examiner's Answer is repetitive of the final Office Action mailed October 31, 2003, and does not substantively address Appellant's arguments in the Appeal Brief. In an effort to avoid such repetitiveness here, and for brevity, Appellant will only once address each new argument raised in the Examiner's Answer.

Out the outset, Appellant notes that the Examiner's Answer does not address Appellant's assertion that Crawford teaches away from the present invention. See Appeal Brief, at 9. Because the examiner does not rebut Appellant's arguments in this regard, all rejections, whether based on Crawford alone, or in combination with another reference, are improper and should thus be withdrawn.

Issue 1

Claims 1, 3, 11-15, 21-22, 30-42, 44, 46, 49, 50, and 52-55 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford *et al.* (U.S. Pat. No. 6,502,113 B1, hereinafter Crawford).

Claims 1, 3, and 13-15

The examiner continues to misapply the Crawford reference in the rejection of claims 1, 3, and 13-15. The examiner has misapplied the Crawford reference because 1) the examiner's alleged "phases" are not the same as the claimed phases; 2) the color-coding scheme of Crawford does not constitute a plurality of predefined actions nor an indication of when parties to a transaction have selected the same predefined action; and 3) the examiner's reliance on *In re Gulack* and *In re Lowry* is misplaced.

Claim 1 is reproduced below:

1. A computer-assisted method of negotiating a real estate lease transaction, comprising the steps of:

(1) displaying on a computer screen a plurality of lease provisions and a plurality of predefined actions associated with each lease provision, wherein the plurality of lease provisions are associated with a first phase of a lease negotiation;

(2) for each of a plurality of negotiators to the lease transaction, selecting one of the plurality of predefined actions associated with each lease provision; and

(3) for each lease provision, determining whether each of the plurality of negotiators has selected the same associated predefined action and, if so, storing in the computer an indication of the associated lease provision as an agreed provision and, if not, deferring non-agreed lease provisions to a later phase of the lease negotiation.

The examiner asserts that Crawford teaches or suggests the use of negotiation phases as claimed in claim 1. Specifically, the examiner states "Crawford describes an online system whereby two parties collaborate to edit a specific document having a plurality of negotiable clauses[
[sic] *multiple, distinct* phases]" Examiner's Answer at 5 (emphasis in original). The examiner is attempting to equate multiple clauses of a contract with multiple phases of a negotiation in order to reject claim 1. This argument fails for two reasons. First, a clause of a contract is not a phase of a negotiation. Merriam Webster's Collegiate Dictionary, 10th Ed., defines "phase" as "a distinguishable part in a course, development, or cycle." The specification also clearly provides examples of negotiation phases consistent with this definition, including lease proposal confirmation, resolving outstanding business issues, obtaining agreement on lease deliverables, defining tenant environment, agreement on legal documents, approving the lease documents, completing landlord works, completion of tenant works, and issuing a best practice report. See specification, Fig. 2. Crawford only deals with a single negotiation phase, i.e., agreement on legal documents.

Second, the examiner's interpretation of the word "phase" is inapposite to the claim language and specification. That is, if the examiner's interpretation of "phase" is used, the claimed invention would not work. The examiner suggests that each contract clause, referred to in the claim as a lease provision, is a "phase" of a contract negotiation. Examiner's Answer at 2. However, the language of claim 1 clearly states that "the plurality of lease provisions are associated with a first phase of a lease negotiation." Using the examiner's interpretation, i.e., substituting the words "lease provision" for the claim language "phase," would result in the circular reasoning that a plurality of

lease provisions are associated with a first lease provision of a lease negotiation. This simply makes no sense, and has no support in the specification, the ordinary meaning of the claims, or otherwise.

The Examiner's Reply also misconstrues "predefined action" and "determining whether each of the plurality of negotiators has selected the same associated predefined action" as claimed. The examiner states "Crawford describes a system for negotiating clauses of a contract and updating clauses to reflect the last of the modifications." Examiner's Answer at 6. While this may be true, this is not the same as a plurality of predefined actions associated with each lease provision. The fact remains in Crawford that the negotiators do not perform a predefined action as claimed, but rather each inserts arbitrary contract language as desired.

The examiner also states, with respect to the claim language regarding determining whether each negotiator has selected the same predefined action, "Crawford visually codes displays to distinguish between clauses that have been negotiated and clauses, which have not yet been agreed to.[*nor determining whether two parties have selected the same predefined action or deferred agreement to a later distinct phase*] [sic]" Examiner's Answer at 6 (emphasis in original). The examiner's reasoning on this aspect of the claim is faulty for two reasons.

First, the examiner's reasoning is inapposite to the plain claim language. That is, claim 1 states that when each of the negotiators has not selected the same predefined action, the method defers non-agreed lease provisions to a later phase of the lease negotiations. However, as discussed above, the examiner has asserted that Crawford's "phases" are the individual clauses of the contract being negotiated. This would result in deferring non-agreed lease provisions to a later contract clause of the lease negotiations, which makes no sense, and has no support.

Second, the examiner improperly relies on *In re Gulack* and *In re Lowry* to ignore functional claim language. Examiner's Answer at 7, 15, 18-19, 21-22, and 24-26. The bare presence or absence of a specific functional relationship is not dispositive of obviousness. *In re Gulack*, 217 U.S.P.Q. 401, 404 (Fed. Cir. 1983). The examiner argues that "descriptive material will not distinguish the claimed invention from the prior art in terms of patentability." Examiner's Answer at 7. However, the court in *Lowry* specifically states that "the printed matter cases have no factual relevance where the invention as defined by the claims *requires* that the information be processed not by the mind but by a machine, the computer." *In re Lowry*, 32 U.S.P.Q.2d 1031, 1034 (Fed. Cir. 1994) (quoting *In re Bernhart*, 163 U.S.P.Q. 611, 615 (CCPA 1969)) (emphasis in original).

The examiner cannot simply ignore claim language. Thus, the examiner has not made a prima facie case of obviousness for claim 1 over Crawford, because the Crawford reference does not teach or suggest computer displayed "lease provisions."

With respect to claim 14, the examiner does not give the recitation "a computer system programmed" patentable weight, stating that a preamble is denied the effect of a limitation where the preamble is not depended upon for completeness. However, the portion of the claim the examiner is referring to is not in the preamble of the claim; it is in the *body* of the claim, and thus cannot be ignored by the examiner, regardless of whether or not it is relied upon for completeness of the claim.

Claims 30, 31, 33, 35-38, 40, 41, 46, 49, 50, 52, 53, 55

Independent claim 30 recites in pertinent part:

- (2) for each of a plurality of negotiators to the real estate agreement, *detecting each negotiator's computer selection of one of the plurality of displayed choices for each of the predefined real estate agreement provisions;*
- (3) for each predefined real estate agreement provision, *determining whether each of the plurality of negotiators has selected the same displayed choice and, for each such same choice, storing in a computer an indication of agreement regarding the associated agreement provision.*

Similar to claim 1, Crawford at least does not teach or suggest the italicized portions of claim 30.

In addition, claim 30 recites:

- (1) displaying on a computer screen a plurality of predefined real estate agreement provisions each relating to one aspect of a potential real estate agreement, each provision having an associated displayed choice including at least an agreement choice and a deferral choice

The Examiner's Answer does not address this aspect of claim 30. Instead, the examiner states that "Crawford shows a color scheme, clause agreement choices and deferred choices([sic] clauses not yet agreed upon or still under negotiation)." This is not the same, however, as displaying on a computer screen a plurality of predefined real estate agreement provisions each relating to one aspect of a potential real estate agreement, as recited in claim 30. Because the

examiner has not addressed all limitations claim 30, there is no *prima facie* case of obviousness, and the rejection of claim 30 is improper.

Claims 11, 21, 34, 42

Dependent claims 11, 21, 34 and 42 are allowable at least for the same reasons as their respective base claims, discussed above. In addition, claims 11, 21, 34 and 42 further recite resolving in a later negotiation phase lease provisions that were deferred from a previous negotiation phase. As discussed above, the examiner is using an incorrect interpretation of the claim term "negotiation phase," resulting in an incoherent, circular reading of the claims.

Claims 12, 22

Dependent claims 12 and 22 are allowable at least for the same reasons as their respective base claims, discussed above. In addition, claims 12 and 22 further recite automatically generating an intermediate document that summarizes points of agreement in the negotiation.

The examiner states that because in Crawford the negotiators prepare revised versions of the actual document being negotiated, that Crawford generates an intermediate document that summarizes points of agreement. However, the examiner's reasoning gives no patentable weight to the claim recitation "summarizes points of agreement." The alleged intermediate documents generated by Crawford are in fact complete contract documents, not an intermediate document that summarizes point of agreement in the negotiation as claimed.

Claims 32, 39

Dependent claims 32 and 39 are allowable at least for the same reasons as their respective base claims, discussed above. In addition, claims 32 and 39 further recite displaying the predefined real estate agreement provisions grouped into distinct negotiation phases. As discussed above, Crawford does not divide a negotiation transaction into distinct phases as claimed, and the examiner is using an improper definition of the term "phase." Indeed, using the

examiner's definition of "phase" results in grouping real estate provisions into distinct contract clauses, which makes no sense. In addition, claims 32 and 39 require the specific grouping of real estate agreement provisions by negotiation phase, which Crawford neither teaches nor suggests.

Claim 44

Appellant submits that the examiner has not rebutted Appellant's arguments for patentability of this claim. The examiner argues that Appellant presents the negotiation techniques of Crawford but merely changes the terminology used. Examiner's Answer at 11. This is simply not true. Crawford does not distinguish from one type of input from another. All contract language entered by a negotiator in Crawford is interpreted as text. For example, if a negotiator enters a value, say "100 square feet," Crawford cannot interpret the value numerically, only textually. Thus, if another negotiator entered the same value as "100 sq. ft.," Crawford would interpret the parties as being in disagreement because the texts do not match. The presently claimed invention, on the other hand, an illustrative embodiment of which is illustrated in Figure 13, has a primary lease provision "Required Space" 1301, with an ancillary value 1309 which numerically identifies the required square footage. Figure 13 is but one possible embodiment of the invention and, regardless of the implementation used, the use of an ancillary value to resolve discrepancies is neither taught nor suggested by Crawford.

Claim 54

Appellant submits that the examiner has not rebutted Appellant's arguments for patentability of this claim, and therefore no reply is necessary, other than to state that Appellant is not merely duplicating an action, but rather illustrating that phases of the negotiation differ.

Issue 2

Claim 2 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Hoyt et al. (U.S. Pat. No. 6,067,531, hereinafter Hoyt). Claim 2 specifically recites that “step (2) comprises the step of selecting either an AGREE choice or a DEFER choice for each lease provision.”

Regarding the combination of Crawford and Hoyt, the examiner states, “any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from Appellant’s disclosure, such a reconstruction is proper.” Examiner’s Answer at 13. The examiner thus admits that the combination is the result of hindsight, yet the examiner has not provided any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, nor has the examiner provided any evidence that the combination does not include knowledge gleaned only from Appellant’s disclosure. The Federal Circuit has repeatedly stated that the limitations of a claim in a pending application cannot be used as a blueprint to piece together prior art in hindsight, *In re Dembiczak*, 50 U.S.P.Q.2d 1614 (Fed. Cir. 1999), and that the Patent Office should *rigorously* apply the requirement that a teaching or motivation to combine prior art references needs to be provided. *Id.* (emphasis added). Thus, the examiner has not rebutted Appellant’s argument that the combination is the result of improper hindsight reasoning, and the rejection of claim 2 should be withdrawn.

In addition, the color coding scheme of Crawford is not the same as an AGREE choice or a DEFER choice. The color coding scheme in Crawford illustrates a result *after a choice has been made*, it is not the mechanism by which the choice is made in the first place. Crawford thus provides no mechanism by which a user can select a DEFER choice. Similarly, Hoyt provides an indication of when a clause is incomplete or in error, Hoyt does not provide the mechanism to choose whether to Agree or Defer regarding a clause in the first place.

Issue 3

Claim 4 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Rickard et al. (U.S. Pat. No. 6,112,189, hereinafter Rickard).

Regarding the combination of Crawford and Rickard, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claim 4 should be withdrawn.

In addition, the examiner has completely ignored the claim recitations in claim 4. Specifically, the examiner has not provided any evidence that any cited reference teaches or suggests "wherein step (2) further comprises the step of receiving from at least one of the negotiators a numerical value pertaining to at least one of the lease provisions."

Issue 4

Claims 5, 6, 16, and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Boesch et al. (U.S. Pat. No. 5,897,621, hereinafter Boesch).

For each of claims 5, 6, 16, and 17, regarding the combination of Crawford and Boesch, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claim 2 should be withdrawn.

In addition, the examiner states that the rejection of claims 5 and 6 in fact includes Rickard as an applied reference based on the dependency of claims 5 and 6 back to claim 4. However, the examiner's rejection clearly states "Claims 5, 6, 16, and 17 stand rejected under 35 U.S.C. § 103 (a) as being unpatentable over Crawford in view of Boesch et al. (U.S. Pat. No. 5,897,621, hereinafter Boesch). Examiner's Answer at 16. Nowhere is Rickard mentioned in this rejection, and Appellant is aware of no case law that stands for the proposition set forth by the

examiner, namely, that rejections automatically carry over to dependent claims. To the contrary, because a dependent claim, by definition, adds limitations to the claim from which it depends, a rejection of the base claim is not, per se, a rejection of the dependent claim. The examiner is in fact attempting to improperly bootstrap the Rickard reference to cure a defective rejection of claims 5 and 6, and the rejection should therefore be withdrawn.

Issue 5

Claims 7, 10, 18, 20

Claims 7-10, 18-20 and 29 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Raveis, Jr. (U.S. Pat. No. 6,321,202, hereinafter Raveis).

Regarding the combination of Crawford and Raveis, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claims 7-10, 18-20 and 29 should be withdrawn.

Claim 29

The Examiner's Answer fails to address the recitations of claim 29. Examiner's Answer at 26. While Appellant acknowledges that its Appeal Brief incorrectly stated "Claim 29 is allowable at least based on the allowability of its respective base claim" when in fact claim 29 is an independent claim (as was correctly illustrated in the Appendix attached to the Appeal Brief), this does not release the examiner from considering all the limitations of the claim. Claim 29 is thus allowable because neither Crawford nor Raveis teach or suggest the use of an evaluation form as claimed.

Claims 8, 9, 19

The examiner has not rebutted Appellant's arguments with respect to claims 8, 9 and 19. Raveis only provides a limited description of informing parties to a transaction of third-party services, and does not electronically transmit to the third-party service provider a request for services pre-populated with information pertaining to the lease negotiation as claimed. Raveis only provides a preferred mode of communication for each vendor, along with the vendor's contact information. Raveis col. 9, ll. 8-31.

Issue 6

Claims 23, 27 and 48 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Luke et al. (U.S. Pat. No. 6,131,087, hereinafter Luke).

Regarding the combination of Crawford and Luke, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claims 23, 27 and 48 should be withdrawn.

Issue 7

Claim 24 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Luke and Raveis.

Regarding the combination of Crawford, Luke, and Raveis, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claim 24 should be withdrawn.

In addition, claim 24 recites, in pertinent part, "generating a request for services from a local service provider." As discussed above, neither Crawford, Luke, nor Raveis teach or

suggest transmitting any information to a service provider. Raveis merely provides contact information, which is far shy of generating a request for services as recited in the claim.

Issue 8

Claim 25 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Luke, Raveis, and Boesch.

Regarding the combination of Crawford, Luke, Raveis, and Boesch, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claim 25 should be withdrawn.

Issue 9

Claims 26 and 45 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Luke and Rickard.

Regarding the combination of Crawford, Luke, and Rickard, the examiner again neglects to provide any evidence that the combination takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, or provide any evidence that the combination does not include knowledge gleaned only from Appellant's disclosure. Thus, the examiner has not rebutted Appellant's argument that the combination is the result of improper hindsight reasoning, and the rejection of claims 26 and 45 should be withdrawn.

Issue 10

Claims 51 and 56-57 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Crawford in view of Hoyt. However, the examiner has provided no evidence of any suggestion or motivation to combine Crawford and Hoyt, as discussed above. In addition, as with claim 2, above, the examiner is relying on a description of prior art systems' behavior before and after a choice has been made, not the mechanisms by which the choice is made in the first place. The color

coding scheme of Crawford is not the same as an AGREE choice and/or a DEFER choice. The color coding scheme in Crawford illustrates a result *after a choice has been made*, it is not the mechanism by which the choice is made in the first place. Similarly, Hoyt provides an indication of when a clause is incomplete or in error; Hoyt does not provide the mechanism to choose whether to Agree or Defer regarding the clause in the first place.

In addition, with respect to claim 56, the examiner improperly gives no patentable weight to various claim limitations. The examiner argues that “the particular language does not serve as a limitation on the claim (i.e., ‘amount of currency, a square footage to be leased, beginning date and terms of a lease, and a summary document.’). ... The type/name of the data does not render an Application patentable.” Examiner’s Answer at 32. However, this flies in the face of Federal Circuit precedent, which states “[t]he printed matter cases have no factual relevance where the invention as defined by the claims *requires* that the information be processed not by the mind but by a machine, the computer.” *In re Lowry*, 32 U.S.P.Q.2d 1031, 1034 (Fed. Cir. 1994) (quoting *In re Bernhart*, 163 U.S.P.Q. 611, 615 (CCPA 1969)) (emphasis in original). Claim 56 clearly recites a computer-assisted method, including outputting information for display on a computer screen, receiving input, and storing in the computer an indication of the associated lease criteria as an agreed provision, all of which are actions clearly performed by a computer. In view of the Federal Circuit’s clear precedent, the examiner must give patentable weight to all the recitations of the claim.

(CONCLUSION FOLLOWS ON NEXT PAGE)

CONCLUSION

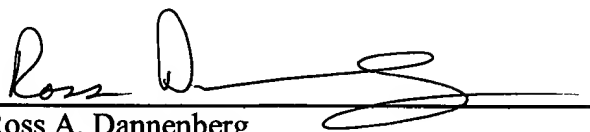
For all of the foregoing reasons, Appellants respectfully submit that the final rejection of claims 1-27, 29-42, 44-46, and 48-56 is improper and should be reversed.

Respectfully submitted,

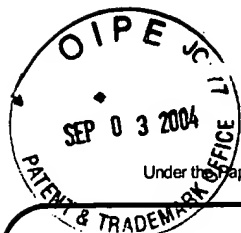
BANNER & WITCOFF, LTD.

Dated: September 3, 2004

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	Examiner Name	Daniel L. Greene	
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